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IN THE

Supreme Court of the United States

OCTOBER 1957 TERM.

No. 717

ZIVNOSTENSKA BANKA, AND SO FORTH,
Appellant,

—against—

STEPHEN, ET AL.,
Respondents.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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Questions 1 and 2 as set forth in the jurisdictional statement are substantial federal questions

Appellee, on the pretext that the statement by appellant in its jurisdictional statement of the questions presented by this appeal is "vague" and "discursive", restates the questions to suit the purposes of his argument. Question number 1 as restated by appellee is too narrow and moreover is incorrect. The question presented is not necessarily confined to a question of federal policy. Article VI, Clause 2, of the United States Constitution does not mention or refer to federal policy nor, we submit, does the question of the constitutionality of the New York Statute involved on this appeal hinge on Article VI, Clause 2, except as that clause makes the United States Constitution supreme

The exclusive right of the federal government to act in the field of foreigen relations is not derived from Article VI, Clause 2 alone. It is implied also from other powers awarded by the Constitution exclusively to the federal government, such as the power to declare war, to maintain an army and navy, to regulate commerce with foreign nations, appoint ambassadors and other public ministers, etc.

This power to act exclusively in the field of foreign relations is not a power delegated by the states. The states never had the power to act in that field, which was vested in the federal government under the Constitution as one of the essential attributes of sovereignty.

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315, *et seq.*;

Willoughby, Constitution of the United States, (2d Ed.) Vol. I, Sections 279-280, pp. 513-516.

Section 977-b of the New York Civil Practice Act is not simply a procedural or remedial statute. It is an announcement by the State of New York of its disapproval of foreign nationalization programs and of its intention not to enforce foreign nationalization decrees. The statute in fact is not confined, in its application, to confiscatory decrees. Where a foreign corporation has been or is "nationalized", the statute creates a cause of action in favor of any creditor or stockholder anywhere in the world, which otherwise would not exist (See *Canada Southern R.R. Co.* v. *Gebhard*, 109 U. S. 527, 538). Any such person may have a receiver appointed of all the assets of such nationalized corporation in the State of New York. The title to such assets passes to the receiver, who is directed to proceed to the distribution thereof to creditors and stockholders, foreign as well as domestic.

The statute has been applied in the case at bar to a situation where a nationalized bank has, by government decree, transferred its assets to the State Bank of Czechoslovakia,

which has assumed its liabilities and which, so far as appears, is financially as sound or sounder than the defendant bank.

There can be no question that this New York statute constitutes an invasion by the State of New York of the field of foreign relations. This court so indicated in *United States* v. *Pink*, 315 U. S. 203, 231. The lower federal courts have also so held.

> *Steingut* v. *Guaranty Trust Co. of New York*, 58 Fed. Supp. 623, 634, aff'd on op. below, except as to interest, 161 Fed. (2d) 571;
>
> *United States* v. *National City Bank of New York*, 90 Fed. Supp. 448;
>
> *United States* v. *New York Trust Co.*, 75 Fed. Supp. 583.

In the *Steingut and National City Bank* cases above cited, the District Court pointed out specifically that this very statute is designed to and does intervene in foreign policy.

Moreover, this statute was not enacted nor was this action brought for the protection of local creditors or even of United States citizens. In the case at bar there are no "local creditors". The New York branch of the appellant bank was liquidated in 1949 under the New York Banking Law and the claims of all creditors who had dealt with that branch were satisfied at that time under the supervision of the New York Banking Department. The plaintiff-appellee is a former citizen of Czechoslovakia, now a citizen of Canada, whose claim is based on deposits made with the Zivnostenska Bank in Czechoslovakia under a contract which provided that payment should be made at the bank's office in Prague (R. 1, fol. 1676, Appellant's Ex. E).

The cases of *Disconto Gesellschaft* v. *Umbreit and Clark* v. *Williard*, cited on page 11 of the motion to dismiss the appeal, therefore do not apply. See *United States* v. *Pink* (*supra*), at page 226.

We submit that the recognition of a foreign government *de jure* or *de facto* is a recognition of the validity of all its

actions, and that the courts of one nation will not sit in judgment on the acts of another. That this is true of decrees of nationalization, so far as they concern assets in the foreign country at the time of nationalization, there can be little question.

Oetjen v. *Central Leather Co.*, 246 U. S. 297;

Ricaud v. *American Metal Co., Ltd.*, 246 U. S. 304;

Underhill v. *Hernandez*, 168 U. S. 250.

This is also true of assets of a nationalized corporation which are in this country at the time of nationalization, where no rights of local creditors are involved. We submit that the reasoning of this Court in its decisions in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink (supra.)* supports this contention. These cases have been so construed by the decisions of the lower federal courts and other legal authority:

United States v. *Bank of New York & Trust Co.*, 77 Fed. (2d) 866, involved a deposit in the defendant bank of a balance of a fund deposited by Moscow Fire Insurance Co., a Russian insurance corporation, with the New York Superintendent of Insurance. Prior to the recognition of the Soviet Government by the United States on the execution of the Litvinov assignment, the Superintendent of Insurance had paid all claims of domestic creditors and had deposited the balance in the defendant bank subject to further order of the New York Court. After the recognition of Russia by the United States, and the execution of the Litvinov assignment, the United States sued the defendant bank in the United States District Court to recover possession of the fund, as assignee of the Soviet Government. The Circuit Court of Appeals held that by the recognition of the Soviet Government in 1933, the validity of the Soviet nationalization decrees was established and could no longer be questioned, and that this applied to assets of the nationalized corpora-

tion in the State of New York. It placed its decision on the ground of the effect of recognition of the Soviet Government and not on the effect of the so-called international agreement. At page 868 of its opinion the Court said:

> "We take judicial notice of the recognition of the Soviet Government by the United States on November 16, 1933, which was the day on which the assignment here relied upon was made. Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456. By that act of recognition the decrees under which this Russian corporation was dissolved and its property confiscated by the Soviet Government became as valid as they would have been had they been passed at a time when we had already recognized the Soviet Government. The effect of recognition was to that extent retroactive. Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733; Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726. When our government recognized that government, the public policy of this country to recognize the validity of Soviet decrees within Soviet territory was established. No one will question the power of the government of the domicile of a corporation to destroy what it has created. Bank of Augusta v. Earle, 13 Pet. 519, 587, 10 L. Ed. 274; Head v. Providence Ins. Co., 2 Cranch, 127, 168, 2 L. Ed. 229. When the now recognized Soviet Government issued its decrees to that effect this corporation was dead. Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U. S. 257, 47 S. Ct. 391, 71 L. Ed. 634; The Greyhound, 68 F. (2d) 832 (C.C.A.2). There can be no serious dispute that its property and all its corporate rights in Russia were subject to such disposition as actually took place in accordance with Russian law. The Russian State obviously could, and this record shows that it did, confiscate everything belonging to this corporation within the confines of Russia. It could, and did,

> acquire for itself every right the corporation in Russia possessed. It became the corporation there so far as we are now concerned. It had all its property and rights as fully as though the corporation had lawfully assigned them to it before dissolution. To that extent our public policy as to confiscatory decrees, so far as it may be expressed by our courts, is of no moment. When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees, in Soviet territory from the beginning of the Soviet regime. Oetjen v. Central Leather Co., supra. See, also, Lazard Bros. & Co. v. Midland Bank, Ltd. [1933] A. C. 289, H. of L., for the rule in England. Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance."

The District Court granted defendant's motion to dismiss the complaint on the ground that the State Court had prior jurisdiction and this was affirmed by the United States Supreme Court (296 U. S. 463).

In *Ozanic* v. *United States*, 83 Fed. Supp. 4, plaintiff as bailee of the S. S. Petar, sunk in collision with a U. S. Navy tanker, brought suit against the United States under the Public Vessels Act to recover for the loss of the vessel. A British corporation sought to intervene in the action as assignee of the claim from the Yugoslav Government which had nationalized the corporate owner of the Petar. The defendant pleaded the Anti-Assignment Statute. At page 6 of its opinion, the District Court said:

> "Since the Yugoslav Government is recognized by the United States, the original nationalization of the Petar's corporate owner by the Yugoslav Government

must be accorded respect, cf. United States v. Belmont, 1937, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. and, considered as a transfer by operation of law so as to be without the statute."

The court held, however, that the assignment by the Yugoslav Government to the British Corporation was a voluntary assignment, and, therefore, void under the Anti-Assignment Act, and denied the motion to intervene.

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, 188 Fed. (2d) 228. At page 229 of its opinion, the Circuit Court of Appeals said:

"At the time of the collision, and when the suit was commenced, a Yugoslav corporation owned the 'Petar'; but in December, 1946, the 'Praesidium' and National Assembly of Yugoslavia 'nationalized' the corporation by proceedings which professed to make the claim 'state property'; and it is common ground that it became so." [Citing United States v. Belmont, supra].

In *Latvian State Cargo & Passenger S. S. Line* v. *McGrath*, 188 Fed. (2d) 1000, plaintiff was a corporation nationalized by decree of the Latvian Soviet Socialist Republic, a government formed by the Russians at the time of their invasion of the Republic of Latvia. The record in the court below contained an affidavit by the United States Secretary of State certifying that the incorporation of Latvia into the Union of Soviet Socialist Republics was not recognized by the Government of the United States. The court held that an affirmative statement by the United States State Department of non-recognition of a foreign government is binding on our courts to the same extent as an act of official recognition of that government. At page 1002 of its opinion the Circuit Court of Appeals for the District of Columbia, said:

"It is settled by United States v. Belmont and United States v. Pink that if there is a formal act by the executive department, either of recognition or of

compact, the courts must give full effect to the terms of such act."

See also:

Day-Gormley Leather Co. v. *National City Bank*, 8 Fed. Supp. 503, 505, 506.

In Corpus Juris Secundum, International Law, Section 5, page 7, the rule is stated as follows:

"Recognition by the United States government of a foreign government operates to validate from the beginning the decrees of the foreign government confiscating and nationalizing property, including property within the United States where such property is embraced by the foreign decree (citing United States v. Pink; United States v. Bank of New York & Trust Co., and Day-Gormley Leather Co. v. National City Bank, all supra). In such case the national policy is paramount and overrides any contrary local public policy of the individual states, and the foreign decrees will be fully recognized and enforced as to local assets, at least where no local creditors have an interest (citing United States v. Pink; United States v. Belmont, and Steingut v. Guaranty Trust Co. of New York, all supra)."

Appellant's view of the applicable law and its interpretation of the *Belmont* and *Pink* cases, therefore, is shared by judges of the lower federal courts, as well as by the editors of one of our leading reference digests.

If a federal policy with respect to the validity and enforcement of the Czechoslovak nationalization decrees is necessary, we submit that recognition or, in this case, continued recognition of the Czechoslovak Government which enacted such decrees is in itself evidence of such a federal policy. Moreover, we have in this case further evidence of the adoption of a federal policy with respect to the Czechoslovak nationalization decrees in particular, and with respect to foreign nationalization programs in general.

In 1946 the United States and Czechoslovakia entered into an international agreement entitled "Agreement between the United States of America and Czechoslovakia respecting commercial policy": This agreement, recorded in full in 61 Stat. 2431-2435, contains the following provision:

> "7. The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that negotiations concerning compensation on account of such claims will shortly begin in Praha."

Appellee argues that since that time there has been a change of administration in Czechoslovakia with a new political party in control and further states "that no substantive step has been taken in fulfillment of this eleven year old promise." The United States Government, however, has continued to recognize the Government of Czechoslovakia, despite the change in administration. Moreover, this agreement with Czechoslovakia is listed in State Department Publication 6427 entitled: "Treaties in Force, A List of Treaties and Other International Agreements of the United States, October 31, 1956." That publication, by its terms, contains "A list of treaties and other international agreements to which the United States has become a party and which are carried on the records of the Department of State as being in force on October 31, 1956" including "those treaties and other agreements which on that date had not expired by their terms or had not been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated." The United States Department of State, therefore has not denounced or terminated this agreement, but considers the same still in force and the assumption is that the efforts toward a settlement are still continuing.

Furthermore, at the time when the Suez Canal Company was nationalized by the Government of Egypt, a joint declaration was made by the Governments of France, the United Kingdom and the United States as follows:

> "They" (such governments) "do not question the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognized right, under appropriate conditions, to nationalize assets, not impressed with an international interest, which are subject to its political authority." (Dept. of State Bulletin Vol. XXXV, #894, 8/13/56).

Again, addressing the United Nations General Assembly, explaining why the United States had voted against a resolution dealing with the development of undeveloped countries, the United States Delegate, Mr. Lubin, stated:

> "If I may turn now to the resolution that has been adopted, I should like to raise two questions. The first is: Was this resolution necessary? In other words, has any one questioned the right of a sovereign state to nationalize or the right of a sovereign state freely to develop its natural resources? * * * "
>
> "As to the first question, every government has the constitutional right to nationalize and—may I add—to denationalize not only its natural wealth, but also any property and any business within its jurisdiction."
>
> (Official Record of United Nations General Assembly, 7th Session, Plenary Sessions, p. 497).

The fact that the membership of Czechoslovakia in the International Monetary Fund was terminated is not an expression by our State Department of a policy not to recognize or enforce the Czechoslovakian nationalization decrees nor, we submit, does the press release issued by the State Department in connection with the termination of its obligations

with Czechoslovakia under the General Agreement on Tariffs and Trade, quoted on pages 9 and 10 of the motion to dismiss. We do not find in the reported cases any support for the appellee's contention that "friendly relations" are necessary, in addition to recognition, in order to validate decrees of a recognized foreign government. It is no doubt true that our relations with the Government of Czechoslovakia have been subject to difficulty and that we have been critical of some of the economic methods which it has adopted. All the more reason, we submit, that the Department of State should remain unhampered in the conduct of such relations, and that neither the State of New York nor any other state should be permitted to invade the field and, by statutory enactment, to disapprove and refuse to recognize or enforce the Czechoslovak nationalization decrees. It may very well be that this policy expressed in the New York Statute and the steps taken thereunder in this and other cases have contributed to the failure on the part of the two governments to arrive at a settlement as contemplated by the international agreement above mentioned.

It seems hardly conceivable that a state, under present conditions, should have the power to invalidate by statutory enactment the acts and decrees of a recognized foreign government, because it disapproves of the character of those decrees, especially for the benefit of foreign creditors and stockholders and where no rights of local creditors are involved. Nor does it seem conceivable that a state should have the right under authority of such statute to impound the funds of a foreign government agency, the State Bank of Czechoslovakia, for the benefit of foreigners, on the ground that it has acquired such assets under governmental decrees of which the state does not approve. As pointed out by this Court in *Chy Lung* v. *Freeman*, 92 U. S. 275, any counter-effect of such acts would fall not upon the state, but upon the government of the United States. In the words of Alexander Hamilton (Federalist Paper No. 80): "The peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."

That there is a constitutional and therefore a federal question involved in this appeal has been certified by the New York Court of Appeals. Appellee says that this question is not substantial, but its importance today can hardly be disputed. Appellee apparently claims that the law is so clear that no consideration of the question by this Court is necessary. With the lower federal courts and one of the leading reference digests interpreting the law and the decisions of this Court in *Belmont* and *Pink* as supporting the position for which the the appellant contends on this appeal, and with the evidence here presented of a federal policy over and above the act of recognition, we submit that the federal question involved is substantial and should not be disposed of on a motion to dismiss the appeal.

Question 3 as set forth in the jurisdictional statement is substantial and is also properly raised

Appellee's interpretation of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co. Ltd.*, 246 U. S. 304, is incorrect. In both cases property in Mexico had been seized by the Mexican government and later was brought into the United States. In the *Oetjen* case the property was that of a Mexican citizen but in the *Ricaud* case it was the property of a United States citizen at the time of seizure. In both cases, it was urged that our courts were not bound to respect the title of the Mexican government acquired by confiscation, since the property was no longer in Mexico. Both held that the American Court was bound to recognize the act of the government which, after the seizure took place, became the recognized government of Mexico.

It is true that the referee did not pass on the merits of this question which he indicated was unnecessary because of his definition of the term "nationalization" (R 1, fol. 608). §977-b, however, makes all property in New York State of a nationalized foreign corporation subject to seizure and distribution, regardless of its location at the time of nationalization. The

judgment appealed from also makes no distinction, but directs the receivers to reduce to their possession and to liquidate and distribute "all assets, credits, choses in action and other property, tangible and intangible, within the State of New York, of the defendant Zivnostenska Banka, National Corporation." The failure of the statute to make this distinction is another factor in support of the appellant's claim that the statute is unconstitutional.

CONCLUSION

The appeal presents a substantial federal question which, according to the certification of the New York Court of Appeals, was presented to and passed upon by that court. We submit that the federal questions presented should be decided by this Court after a full hearing, and that the motion to dismiss the appeal should be denied.

Respectfully submitted,

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